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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 24

DANIEL VASQUEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
January 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 24.

2 Counsel, would you like - - - do you want any
3 rebuttal time?

4 MR. LANDAU: Yes, Your Honors. I would like
5 three minutes for rebuttal.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure. Go
7 ahead.

8 MR. LANDAU: Thank you. Good morning, Your
9 Honors. My name is Warren Landau. I'm associated with
10 Lynn Fahey of Appellate Advocates, attorney for appellant.

11 Appellant argues that defense counsel rendered
12 ineffective assistance in this case in which the issue - -
13 - the defense was identity, or the People's failure to
14 prove identity when counsel failed to object to an
15 inadmissible show-up identification.

16 JUDGE READ: How much time elapsed - - - do we
17 know from the record exactly, or roughly, how much time
18 elapsed between the pointing out of your client down the
19 street and then the officer bringing him back and the
20 show-up?

21 MR. LANDAU: Well, we don't know exactly, but
22 presumably, from the testimony that was given at trial and
23 at the hearing, it was a matter of minutes. There was no
24 estimate - - -

25 JUDGE GRAFFEO: Did the - - -

1 MR. LANDAU: - - - as to the exact time.

2 JUDGE GRAFFEO: - - - police officer ever lose
3 sight of Mr. Vasquez after the victim pointed him out?

4 MR. LANDAU: The officer testified that he
5 didn't. Mr. Garcia testified that the man who was heading
6 toward the corner had just turned the corner, so there was
7 a discrepancy in the testimony as to that. But I don't
8 think that any of those things are critical here to the -
9 - - the - - -

10 JUDGE SMITH: It is - - - it is critical for you
11 to show that the People had to give a 710.30 notice of the
12 second show-up.

13 MR. LANDAU: Yes.

14 JUDGE SMITH: Looking at the case, as they would
15 have seen it at the time they served their - - - the
16 710.30 notice they did serve, how could they possibly have
17 foreseen that they were going to be offering evidence of
18 the second ID or even understood that there were two of
19 them?

20 MR. LANDAU: There were two separate procedures.
21 The one was - - -

22 JUDGE SMITH: Well, then if he - - -

23 MR. LANDAU: - - - a point-out, one was a show-
24 up.

25 JUDGE SMITH: You're the prosecutor. You're

1 sitting with what looks like a perfectly simple case. You
2 have a guy who identified the perpetrator on the street
3 and the cop ran and caught him. You don't know that at
4 trial the victim is going to have a failure of
5 recollection.

6 MR. LANDAU: No, but that's always a possibility
7 in any case, and I think focusing on - - -

8 JUDGE SMITH: So in any case - - - in any case,
9 then, you have to be prepared, you have to look at the
10 possibility, if you're a prosecutor of - - - what is that,
11 60.35 or 60.25, or whatever it is - - - you have to look
12 at the possibility of evidence under that section and give
13 notice on the contingency that you'll be using it?

14 MR. LANDAU: But the thing is the identification
15 procedure itself is admissible. In Grajales, the court's
16 interpretation of the statute essentially came down to the
17 fact that the People couldn't intend to give - - - to
18 offer testimony about a photo identification because photo
19 identifications are not admissible. Show-up
20 identifications are admissible, and under some
21 circumstances they're even admissible on third-party
22 testimony. The People can never be certain that a
23 complainant will be unable - - - will be able or unable to
24 identify someone months or even years later - - -

25 JUDGE SMITH: Do we even - - -

1 MR. LANDAU: - - - at trial.

2 JUDGE SMITH: Do we even know that the
3 prosecutor, at the time he gave his notice, understood or
4 reasonably should have understood that there was what we
5 are now calling a show-up? I mean, this was - - - what
6 you're calling a show-up is that after he grabs the guy
7 who the victim has pointed out, and he's got the guy in
8 custody, he says to the - - - to the victim: Are you sure
9 this is the one? I mean, couldn't you look at that as
10 part of a single observation, not as a new separate
11 identification?

12 MR. LANDAU: Okay. Even though the time frames
13 are somewhat close, they're two separate procedures.

14 JUDGE SMITH: Even if - - -

15 MR. LANDAU: One is a procedure that - - -

16 JUDGE SMITH: Even if the prosecutor did not
17 anticipate that the victim was going to testify that he
18 momentarily lost sight of the perpetrator?

19 MR. LANDAU: I'm sorry?

20 JUDGE SMITH: Suppose the prosecutor didn't know
21 until trial, and couldn't reasonably have known that the
22 victim was going to say, yes, he was around the corner for
23 a minute and I lost sight of him, which is contrary to the
24 police testimony; he says he never got around the corner.

25 MR. LANDAU: Right, the police testified one

1 way.

2 JUDGE SMITH: Hold on. Suppose the prosecutor
3 failed to anticipate that feature of the victim's
4 testimony, can you reasonably expect the prosecutor to
5 think in advance, oh, well, okay, I've got two IDs here, I
6 better notice both of them?

7 MR. LANDAU: Well, the problem is that the
8 requirement of notice under 710.30 can't be dependent on
9 the prosecutor's subjective knowledge at the time of - - -
10 that he gives notice.

11 JUDGE SMITH: Well, what about - - -

12 MR. LANDAU: If that were the case - - -

13 JUDGE SMITH: Well, what about what he
14 reasonably should have known at the time he gave notice?

15 MR. LANDAU: I'm not quite clear what that
16 means. The prosecutor can never anticipate exactly what
17 the situation will be, but the bottom line is if there is
18 a show-up, and the way the testimony came out at trial,
19 there was a show-up, the People are responsible for
20 knowing and providing notice about that.

21 CHIEF JUDGE LIPPMAN: Counsel - - -

22 MR. LANDAU: They didn't - - -

23 CHIEF JUDGE LIPPMAN: - - - assuming you're
24 right, why did it matter in this case?

25 MR. LANDAU: Because the evidence here was not

1 overwhelming. There is a reasonable probability of a
2 different result without that. In Trowbridge, the court
3 recognized, in general, about the importance of multiple
4 identifications. Here the complainant did not give - - -

5 CHIEF JUDGE LIPPMAN: But you have the point-
6 out, you have the - - - recovered the weapon that was
7 ditched. Why is this really dispositive in terms of the
8 case?

9 MR. LANDAU: Because first of all, the weapon
10 that was recovered was not linked to the defendant by any
11 type of testing. There were no fingerprint - - - no
12 fingerprint testimony was offered, no DNA testimony was
13 offered. And there's a very significant problem here that
14 alone - - -

15 CHIEF JUDGE LIPPMAN: In the context of this
16 witness - - - they're tracking, you know, him this whole
17 time, calling them, seeing him, seeing the weapon put
18 aside - - -

19 MR. LANDAU: Well, I mean - - -

20 CHIEF JUDGE LIPPMAN: - - - again, in terms of -
21 - - assuming you're right and that they needed to provide
22 this kind of notice, again, in this total context, you
23 still think that it's - - - that it's critical?

24 MR. LANDAU: Yeah, there's a critical problem at
25 trial that alone could have been the basis on which a jury

1 would have found reasonable doubt. The complainant
2 testified that his would-be robber was wearing a black
3 shirt with a little bit of color; the officer testified
4 that appellant, when he was apprehended, was wearing a
5 white shirt with brown stripes.

6 JUDGE SMITH: But what about the admission to
7 the - - - the grand jury testimony in which the defendant
8 admits that he had an encounter with the victim, just says
9 he didn't - - - he just says it wasn't a robbery.

10 MR. LANDAU: He didn't testify that he had an
11 encounter with the victim. He said he had an encounter
12 with someone in the general area; he asked or panhandled
13 for money. I mean, the defendant was plainly, by
14 anybody's testimony - - - his, before the grand jury, or
15 the testimony of the police at trial, the defendant was
16 plainly in the neighborhood. That doesn't conclusively
17 establish that the defendant was the would-be robber.

18 JUDGE PIGOTT: The People make the argument too,
19 I believe, that regardless of the 710.30, this event was
20 amply covered in the Wade hearing. Did I misunderstand
21 that?

22 MR. LANDAU: Well, they make that argument, but
23 that's not a reasonable argument. Defense counsel
24 specifically eschewed seeking suppression of any non-
25 noticed ID procedure. Defense counsel - - - and the

1 bottom line is the court never ruled on it. At page A7
2 and A10 of the record, the court talked about one
3 identification procedure. Surely if the court wanted to
4 rule on a point-out and a show-up, the court would have
5 talked about a point-out and a show-up, not one
6 identification - - -

7 JUDGE SMITH: Is there anything in the record of
8 the Wade hearing that shows that anybody knew the show-up
9 even happened?

10 MR. LANDAU: No, and in fact, the officer didn't
11 really testify about a show-up at the Wade hearing. But
12 that's not dispositive either. It can't be that the DA is
13 required to provide notice only when the police give them
14 good information that a show-up actually occurred. It
15 can't be that kind of situation under the statute. That's
16 an interpretation that would emasculate the statute.

17 CHIEF JUDGE LIPPMAN: Okay, counselor, you'll
18 have your rebuttal time.

19 MR. LANDAU: Thank you.

20 CHIEF JUDGE LIPPMAN: Thanks, counselor.
21 Counselor?

22 MS. ALDEA: May it please the court, my name is
23 Donna Aldea. I represent the People of the State of New
24 York.

25 Your Honors, the whole ineffective assistance

1 counsel claim before this court is premised on a central
2 fallacy, and that fallacy is really an artifice that
3 defendant has created for the purposes of this appeal.
4 That artifice is that there were two separate
5 identification procedures in this case. But there were
6 not. And prior to this appeal - - -

7 JUDGE SMITH: The way the proof came out at
8 trial, it becomes critical, or at least it was critical
9 enough that the People wanted to prove it, that there was
10 a separate conversation between the police officer and the
11 victim in which the officer says are you sure this is the
12 guy and he says yes.

13 MS. ALDEA: Yes, Your Honor, that did come out
14 at trial, but that doesn't make it a - - -

15 JUDGE SMITH: Well, why isn't - - -

16 MS. ALDEA: - - - separate procedure.

17 JUDGE SMITH: Why isn't that a separate ID?

18 MS. ALDEA: It's not a separate ID because of
19 the definition of what 710.30 is really about. 710.30 is
20 about - - - well, actually, let me step back. I won't
21 even go there yet. I'm going to say why it wasn't because
22 of what was argued below. In this case - - - this is what
23 I was talking about the artifice - - - when we were at the
24 level of the trial, when we were at the level of the
25 suppression hearing, every party to this litigation

1 understood that there was only one identification
2 procedure. Counsel specifically - - -

3 JUDGE SMITH: Except, but then at trial
4 everybody turned out to be wrong.

5 MS. ALDEA: No, Your Honor, it was still only
6 one procedure. It's just a confirmation that occurred
7 after an identification, but it was part and parcel of one
8 event.

9 But going to the final claim, first, about what
10 was actually litigated at the Wade hearing, to answer Your
11 Honor's question, at the Wade hearing, counsel expressly
12 sought suppression of the post-seizure identification
13 which he now deems a show-up.

14 JUDGE SMITH: I mean, I realize those words are
15 there; they originally come from the judge, and the lawyer
16 says what else could she be talking about.

17 MS. ALDEA: No, Your Honor. Actually, I am now
18 quoting from A24 of the appendix, and this is paragraph 37
19 of counsel's suppression motion. This is defendant's
20 suppression motion in the court, and what it says, the
21 quote is - - - the attorney argued, quote, "that the out-
22 of-court identification was the direct result and fruit of
23 the illegal seizure." There was only one identification
24 that followed the seizure. That would have been - - -

25 JUDGE SMITH: Is it - - -

1 MS. ALDEA: - - - what they're now claiming - -
2 -

3 JUDGE SMITH: Is it - - -

4 MS. ALDEA: - - - is a show-up.

5 JUDGE SMITH: Is it conceivable to you that
6 those words are in the defense lawyer's omnibus motion
7 word processor?

8 MS. ALDEA: No, Your Honor, what is conceivable
9 is that the notice of motion was boilerplate, and that is
10 what counsel points to now as having limited it to notice
11 procedures.

12 JUDGE SMITH: And do you read - - -

13 MS. ALDEA: But I'll go beyond that.

14 JUDGE SMITH: When you read the Wade hearing, do
15 you really think that anybody knew that there was a
16 significant event consisting of this conversation between
17 the officer and the victim: "Are you sure?", "Yes, I'm
18 sure."

19 MS. ALDEA: Well, Your Honor, the words "Are you
20 sure?", "Yes, I'm sure." were not used, but did the Wade
21 hearing focus on the post-seizure - - -

22 JUDGE SMITH: There's no - - -

23 MS. ALDEA: - - - identification - - -

24 JUDGE SMITH: There's no - - - I understand
25 there's a reference by the judge; there's no testimony to

1 any post-arrest ID at the Wade hearing.

2 MS. ALDEA: Yes, there is, Your Honor. Yes,
3 there is.

4 JUDGE SMITH: Where is that?

5 MS. ALDEA: Because at the Wade hearing what
6 happened is that counsel at the Wade hearing, defense
7 counsel, focused on the circumstances surrounding how
8 defendant was held after his seizure. And those are the
9 factors that typically go into the determination of
10 whether a show-up identification is suggestive. Again,
11 this is post-seizure. Now, in response to counsel's
12 questions - - -

13 JUDGE SMITH: Is there any - - - I mean, is
14 there any testimony at the Wade hearing from which you
15 learn that the post - - - that the so-called show-up ever
16 happened?

17 MS. ALDEA: Yes, Your Honor, because at the Wade
18 hearing the attorney asks the officer, specifically, did
19 you have a conversation after the defendant was seized.
20 And he says yes, I went back to speak to the complainant
21 and he told me that the defendant was the person who
22 robbed him.

23 JUDGE SMITH: That's - - -

24 MS. ALDEA: That's a confirmation.

25 JUDGE PIGOTT: Well - - -

1 JUDGE SMITH: That's in the Wade hearing?

2 MS. ALDEA: Yes, that is - - -

3 JUDGE PIGOTT: Well - - -

4 MS. ALDEA: - - - at the Wade hearing.

5 JUDGE PIGOTT: - - - I think he also asked if he
6 was handcuffed at the time, and then he said how many
7 officers were holding him, which seems to indicate that he
8 was in care, custody and/or control.

9 But I want - - - let me - - - I want to ask you
10 something about these 710.30s. Why do you put in a 710.30
11 that it's a show-up - - - or excuse me, that it's a - - -

12 MS. ALDEA: Point-out.

13 JUDGE PIGOTT: - - - point-out, rather than
14 simply say he was identified on July 4th, 2007, so that we
15 don't get into this Internal Revenue codization of
16 criminal law to say well, this is a point-out, this is a
17 show-up, this is an ID.

18 MS. ALDEA: I don't know why that language was
19 used, but it wouldn't vitiate the fact that there was, in
20 fact, notice given of one procedure that was, in fact, not
21 police arranged. Maybe the reason for it, if I had to
22 speculate, would be to point out that really no notice was
23 required of anything in the first place because - - -

24 JUDGE PIGOTT: Why is it - - -

25 MS. ALDEA: - - - none of this was police

1 arranged.

2 JUDGE PIGOTT: You know, I read that and I get
3 that case, but 710.30 says, "or testimony regarding an
4 observation of the defendant, either at the time or place
5 of the commission of the offense or upon some other
6 occasion relevant to the case to be given by a witness who
7 has previously identified him as such". And it says you
8 have to serve it. It doesn't say it has to be a police
9 officer. It doesn't have to say - - - the government. If
10 you'd had a neighbor, you know, that had done something on
11 - - - at that date and time, you would have had to have
12 given a 710.30, wouldn't you?

13 MS. ALDEA: Well, Your Honor, I mean, that comes
14 - - - the fact - - - the requirement that it be a police-
15 arranged confrontation comes from Gissendanner - - -

16 JUDGE PIGOTT: I know.

17 MS. ALDEA: - - - which is just a seminal case.

18 JUDGE PIGOTT: But what - - -

19 MS. ALDEA: Are you talking about the 60.25?

20 JUDGE PIGOTT: No, I'm just saying I don't get
21 where 710.30 says you only have to talk about the fact
22 that it's cops.

23 MS. ALDEA: It - - - well, it doesn't - - - it
24 needs to be - - - the reason for it - - - 710.30 doesn't
25 say that. The rationale behind it is this: Wade only

1 applies to state action. In other words, suppression is
2 only warranted - - -

3 JUDGE PIGOTT: Okay. So it - - -

4 MS. ALDEA: - - - on state action. So the
5 extension - - - this court has read into 710.30 the
6 requirement that it must be some state action that is
7 involved, so it has to be police arranged.

8 JUDGE PIGOTT: Well, it could - - -

9 MS. ALDEA: And that comes from case law.

10 JUDGE PIGOTT: Right. But if 710.30 is simply a
11 notice to the defendant of intention to offer evidence - -
12 -

13 MS. ALDEA: Um-hum.

14 JUDGE PIGOTT: - - - can't the argument be made
15 that if it's a neighbor - - - I realize I'm off the topic
16 of this - - - if it's a neighbor that you have to give
17 them notice. They then say well, I want a hearing as to
18 this - - - as to what the neighbor saw, when and how and
19 under what circumstances. You would come back and say
20 it's not state action, you don't get a Wade, all you get
21 to know is that we have a - - - we have a disinterested
22 witness who is going to testify.

23 MS. ALDEA: 710.30 has never been interpreted
24 that way, ever. And so - - -

25 JUDGE PIGOTT: We should fix it, shouldn't we?

1 MS. ALDEA: No, Your Honor, you should not,
2 because the whole purpose of the notice requirement is to
3 allow the defendant to move for a suppression hearing. If
4 there would be no basis to get suppression, there's no
5 basis to give the notice in the first place.

6 And in fact, this court has recently held in
7 Grajales, which was being talked about before with respect
8 to photographs, that because the People can't introduce
9 photographic identifications at trial in the first place,
10 there is no need to notice those, either. And that is
11 police-arranged and it's an identification by the witness
12 - - -

13 JUDGE GRAFFEO: If we - - -

14 MS. ALDEA: - - - so there would be no basis for
15 that.

16 JUDGE GRAFFEO: If we agree with your adversary
17 that Mr. Garcia was asked twice to identify the defendant
18 here, do you have a harmless error argument?

19 MS. ALDEA: Well, it's not a harmless error
20 argument; it's an ineffective assistance of counsel claim,
21 so there would be no prejudice. The lack of prejudice is
22 apparent in this case because of the fact - - - defendant
23 highlights that this was, you know, a weak case, it wasn't
24 a strong case, it was a one-witness identification.
25 That's really not what's dispositive here. What matters

1 is what was added by the non - - - the show-up, you know,
2 testimony that came in, the confirmation identification
3 that came in. And the answer here is nothing was added by
4 that, because what already properly came in in this case,
5 as a result of what was noticed, what was litigated at the
6 Wade hearing, what there is no objection to here, was the
7 fact that the complainant testified - - - the victim
8 testified - - - that the defendant was standing outside
9 the store the entire time that he was on the phone with
10 911.

11 JUDGE SMITH: Do you think - - -

12 MS. ALDEA: The 911 tape came in.

13 CHIEF JUDGE LIPPMAN: What makes the point-out
14 so reliable that this is only corroborative?

15 MS. ALDEA: What makes the point-out - - -

16 CHIEF JUDGE LIPPMAN: Yeah - - -

17 MS. ALDEA: - - - so reliable?

18 CHIEF JUDGE LIPPMAN: - - - why is that so
19 reliable that - - -

20 MS. ALDEA: Because in this case when as soon as
21 the complainant came out of his store and the police were
22 there, the complainant pointed down the street and said
23 that's him, that's him, he's the guy who robbed me; that
24 was coming in anyway. The police officer then testified -
25 - -

1 JUDGE SMITH: But you say the second one added
2 nothing. Why did the prosecutor go to the trouble of
3 bringing the police officer back on the stand to testify
4 to it?

5 MS. ALDEA: Well, he had to provide the link.
6 That was necessary. But that can't be challenged here.
7 He had to testify that the person he stopped was in fact
8 the defendant who was sitting at the table. But that part
9 of his testimony was not going to be affected.

10 JUDGE SMITH: Not only the person he stopped was
11 the defendant - - - I think he'd already testified to that
12 - - - but that Garcia said so.

13 MS. ALDEA: That the person that Garcia
14 identified was in fact - - - and the person he stopped
15 that he never lost sight of - - - was the defendant.

16 But I do want to go back to only one thing - - -

17 JUDGE GRAFFEO: Well, do we know from the record
18 if there was anyone else present in the vicinity when Mr.
19 Garcia first said it's him, it's him?

20 MS. ALDEA: There was nobody else there,
21 according to the testimony of the officer. And to go to
22 the initial question that was asked, actually, by this
23 court, how much time elapsed - - - counsel, I think, said
24 we don't know how much time elapsed between the two
25 procedures. That's actually not true. The testimony at

1 page A43, which is in the suppression hearing, the officer
2 testified that from the time that he stopped the defendant
3 on the corner, less than a minute elapsed. So we're not
4 talking minutes, we're talking seconds before the other
5 police officer arrived and he went back to speak to the
6 complainant.

7 The first part of this, though, that I do want
8 to go back to is that in this case - - -

9 CHIEF JUDGE LIPPMAN: Counselor, very quickly.
10 Your time is up.

11 MS. ALDEA: Yes, very quickly - - - is that in
12 this case the key to determining whether a procedure is
13 police-arranged, and therefore has to be noticed, that is
14 from this court's decision in Clark and Williams, and I'm
15 going to quote, is whether, quote, "given the erratic
16 circumstances of the detective's encounter with the
17 defendant the resulting show-up was unavoidable, the
18 product of a fast-paced uncontrollable situation". That's
19 exactly what happened here. In fact, the officer - - -

20 JUDGE SMITH: If I could - - -

21 MS. ALDEA: - - - didn't even know - - -

22 THE COURT: Judge Smith?

23 JUDGE SMITH: I don't want to disrupt you, but I
24 think I may have asked this before and I'm sorry but I'm
25 having trouble. Are you saying that the show - - - the

1 so-called show-up or the second conversation or the second
2 half of the show-up, whatever you want to call it, are you
3 saying that was testified to at the Wade hearing?

4 MS. ALDEA: Yes, Your Honor.

5 JUDGE SMITH: Can you give me the - - - don't
6 take all our time now, but if you could at some point let
7 me know the page; I'm having trouble finding it.

8 MS. ALDEA: I can tell you right now. The
9 testimony was - - - it wasn't - - - the exact language
10 that was used was not what was used at trial, but what was
11 testified to - - -

12 JUDGE SMITH: Just give me a page number.

13 MS. ALDEA: The page number is - - - I'm
14 actually looking at it right now. It's on page A45. It's
15 also in our brief, actually, but it's on page A45 and A46.

16 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,
17 counselor.

18 MS. ALDEA: Thank you.

19 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

20 MR. LANDAU: Yes, Your Honors. I'm going to
21 touch briefly on a few of the points my colleague has
22 raised. First, this - - - defense counsel didn't waive
23 anything at the hearing. In order for there to be a
24 waiver the court has to explicitly address the procedure
25 that was not the subject of notice. The court didn't do

1 that. If you take a look at A7 and A10, the court
2 addressed only one procedure; that was the point-out. So
3 regardless of the other questions that may have been asked
4 at the hearing, the court didn't render a ruling on that,
5 so the statute doesn't apply.

6 Defense counsel also didn't argue about a show-
7 up on either side. The prosecutor didn't; defense counsel
8 didn't. Just because a few questions were asked that
9 might have been relevant to such an argument doesn't mean
10 it was litigated.

11 This was a police-sponsored show-up. This was a
12 typical police-sponsored show-up. The police officer
13 brought the defendant back to the vicinity of the store,
14 he was allowed to testify that the complainant had an
15 opportunity to view the defendant at that time, and he
16 specifically asked the complainant if he was sure. The
17 only reason that was admissible is because it was
18 purportedly an identification made under circumstances
19 covered by 710.30. It was admissible because it was not
20 unconstitutional, and it was a prior identification
21 procedure. If it was just - - -

22 JUDGE SMITH: By a witness who was not able to
23 make an in-court ID.

24 MR. LANDAU: This was testified to by the police
25 officer, but the complainant did give identification

1 testimony, even though he didn't give the ultimate
2 testimony that the defendant was that person, he could - -
3 -

4 JUDGE SMITH: But I mean, as I understand it - -
5 - maybe I'm wrong - - - the whole predicate for the recall
6 of the officer was CPL 60.25, or whatever; is that right?

7 MR. LANDAU: Yes, it is. It was, because the
8 complainant failed to make an in-court ID and the court
9 ruled that he had indicated that he was unable to do so
10 due to lack of memory. But first of all, the complainant
11 did give identification testimony. He laid the foundation
12 for the officer's explicit statement about what the
13 complainant himself - - -

14 JUDGE SMITH: Suppose you'd had a perfect
15 lawyer, who as soon as this testimony was given said, oh,
16 judge, they didn't notice that under 710.30. And the
17 prosecutor might then say, well, as a matter of fact, I
18 had no intention of admitting it until the complainant
19 lost his memory, but I now ask that for good cause I be
20 allowed to give a late notice, and if you want to
21 interrupt the trial and do a suppression hearing, go right
22 ahead. Could he have done that?

23 MR. LANDAU: No, because the People should have
24 known at the beginning of the fact that there was a prior
25 identification procedure in the form of the show-up. The

1 question of whether notice is to be given can't depend on
2 what the officer tells the prosecutor, and the prosecutor
3 has to anticipate: A, there might be a lack of memory,
4 and B, in any event, the interpretation of the statute
5 that the People are offering is simply an unreasonable
6 one, it's an absurd interpretation and it would emasculate
7 the statute; it would cause the statute to fail of its
8 essential purpose.

9 JUDGE PIGOTT: Well, what happens, then, when
10 you - - -

11 JUDGE GRAFFEO: Prosecutors - - -

12 JUDGE PIGOTT: I'm sorry, Judge; go ahead.

13 JUDGE GRAFFEO: Can prosecutors avoid this
14 problem in the future by not breaking - - - by not putting
15 the two different categories in there, the point-out and
16 the show-up?

17 MR. LANDAU: They might be able to do that, but
18 by indicating a point-out they also misled defense
19 counsel. Defense counsel didn't have an opportunity to
20 attempt to make any other argument.

21 And if I can finish answering the question - - -

22 CHIEF JUDGE LIPPMAN: Yeah, yeah, sure; answer
23 the question.

24 MR. LANDAU: Here there was a point-out. They
25 could have - - - maybe they could have said a prior

1 identification procedure; that's not customary, by the
2 way, but maybe they could have said that. They also could
3 have said point-out and show-up.

4 JUDGE SMITH: But - - -

5 MR. LANDAU: It wasn't hard - - -

6 JUDGE SMITH: - - - suppose there had been a
7 line-up and the witness picks him out in a line-up, and
8 afterwards the - - - or at some point after that the
9 prosecutor said - - - the prosecutor said to the witness:
10 Are you sure? And the witness says yes. You've got to
11 notice two IDs?

12 MR. LANDAU: Well, that's clearly one ID
13 procedure; it's a line-up. Here there were two types of
14 ID procedures, even though they were close - - - close in
15 time. One was a spontaneous - - -

16 JUDGE SMITH: Even though on the officer - - -

17 MR. LANDAU: - - - point - - -

18 JUDGE SMITH: - - - on the officer's version - -
19 - on the officer's version, the defendant was never out of
20 the victim's sight.

21 MR. LANDAU: Yes, that's true. That doesn't
22 mean there's only one ID procedure. These are clearly two
23 different ones. One was a spontaneous - - -

24 JUDGE SMITH: And wait a minute, "Is that the
25 guy?", "Yes, that's the guy." Three minutes later:

1 "You're sure?", "Yes, I'm sure." Why isn't that one
2 rather than two?

3 MR. LANDAU: Because they take place at two
4 different points in time, even though they're close in
5 time; they take place under different circumstances.

6 JUDGE PIGOTT: Well, Judge Graffeo's right,
7 though, I mean, if we did 710.30s and said it's date and
8 time, you'd gotten one notice for the 710.30 on the date
9 and time, and you say and there was also a line-up, you
10 know, twenty-four hours later or three days later or
11 whenever they did the line-up, and you could examine on
12 both.

13 MR. LANDAU: Well, I mean, if you're talking
14 about three days later, if the People are identifying the
15 prior procedure at a specific date and time, then that's
16 not going to suffice, either. On the other hand, defense
17 counsel would have an opportunity, via a request for a
18 bill of particulars, for the People to specify the nature
19 of the procedure and the time of the procedure, so - - -

20 CHIEF JUDGE LIPPMAN: Okay, couns - - -

21 MR. LANDAU: Okay.

22 CHIEF JUDGE LIPPMAN: Thanks, counselor.

23 MR. LANDAU: Thank you.

24 CHIEF JUDGE LIPPMAN: Thank you both.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE OF THE STATE OF NEW YORK v. DANIEL VASQUEZ, No. 24, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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